IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS, et al,	§	
	§	
	§	
Plaintiffs,	§	
	§	Case No.:
vs.	§	4:20-cv-00957-SDJ
	§	
GOOGLE, LLC,	§	
	§	
Defendant.	§	

STATUS CONFERENCE
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Monday, November 20, 2023; 9:34 a.m.
Plano, Texas

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(Continued on page 2.)

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November 20, 2023 9:34 a.m.

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P R O C E E D I N G S

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THE COURT: All right. Good morning. Please be seated.

All right. So we're here on cause number 4:20-cv-957, State of Texas, et al versus Google, LLC. Let's go ahead and have appearances of counsel. We can start with the plaintiff states, and maybe you can let me know who will be doing your presentation.

MR. LANIER: All right, Your Honor. Mark Lanier here from Lanier Law Firm. I will be doing probably most of the speaking unless I really start messing up, in which event it will be the other counsel.

If I may introduce counsel table, is that --

THE COURT: Please do.

MR. LANIER: Ashley Keller with Keller Postman is in and co-lead counsel. We also have Trevor Young who is with us. We have Roger Alford who's down here from Notre Dame. We have James Lloyd who is with the AG's office. And we have Joe Graham who is with Norton Rose Fulbright.

THE COURT: All right. Thank you, Mr. Lanier.

And Google, Mr. Yetter, if you want to go ahead and make your appearance and identify your co-counsel.

MR. YETTER: Yes, Your Honor. Good to see you. Paul Yetter on behalf of the defendant, Google; and my co-counsel, Eric Mahr from Freshfields; and my colleague, Mollie Bracewell from my firm, will be here today. Given the interplay between the MDL and this case, Mr. Mahr is going to take -- I believe present most of our position today.

THE COURT: All right. Thank you, counsel, and welcome back to the Eastern District of Texas.

I want to let you know that as we have in the past, we have a media line that the media is able to listen in on our hearing.

I'll repeat for counsel that we do tend to get the best reception, so to speak, from the podium, that big podium there. But if you prefer to use a lapel mic or the table mic, you can do so. Just make sure that green light's on; that's the lapel mic.

So we're here for a status conference on the case. And just to sort of orient us, I'm going to briefly go through -- very briefly -- a bit of the history of this case and then talk a little bit about what I understand has happened while the case has been in the Southern District of New York.

So although I know the case history really goes back to 2019 and the investigation from the States, I'm going to start with when it came to this court. So this lawsuit,

as you all will recall, was filed in this court back in December of 2020. It proceeded in this court until August of 2021, at which time the JPML made the decision that this case should be included in an MDL that was -- this is MDL, I'm just going to call it, 3010 in the Southern District of New York, and the case was transferred around mid-August 2021. So for approximately the next two years, the case proceeded in the Southern District of New York, together with the other actions consolidated in the MDL.

As you all are also aware, during this time frame, Congress enacted legislation, the State Antitrust Enforcement Act of 2021, enacted in late 2022, and that amended Section 1407(g) such that it exempted state antitrust enforcement actions from being able to be consolidated into MDLs.

In early 2023, around February, the States moved for the case to be remanded to this court. There was a briefing and argument about whether or not this legislation was retroactive. Ultimately, the JPML made its decision in June that the case did need to be sent back to this court. What followed was some mandamus practice in the Second Circuit, which was resolved recently, ultimately, and did not alter the JPML's decision.

So in the very recent past, this case has now completely come back to this court, and so here we are for a status conference. We have filings from both sides about the

status of the case -- they were helpful, I appreciate them -- including the attachments from both sides that included proposed schedules, and we can talk about that today, as well as some other information about the background of the case.

So before I hear from counsel, I want to talk a little bit more about what I understand, broadly speaking, has happened during the two years the case was up in the S.D.N.Y. with Judge Castel.

So I understand that at the outset, the decision was made that the Court would first evaluate -- I'm talking about the S.D.N.Y., would first evaluate the States' federal antitrust claims and test them against motion to dismiss practice from Google. And that arc went until September of 2022, at which time Judge Castel issued a ruling that basically granted in part and denied in part Google's dismissal motions and I would say, you know, basically pruned the federal antitrust claims.

Following that, the states have submitted a third and now, as I understand, as of May 2023, a fourth amended complaint. I understand that Judge Castel allowed the fourth amended complaint really only to alter I think some of the State DTPA claims; and other than that, it probably, you know, was to look like the third amended complaint.

From a discovery standpoint -- and you all can correct me if I get any of this wrong. So from a discovery

standpoint, I understand that following the Court's ruling on the dismissal motions, Judge Castel had initial disclosures due in January 2023, about mid-January it looks like. And then I know there were orders about when discovery was supposed to go out. But what I understand he had -- again, this is for the MDL -- I understand they had a fact discovery deadline to be completed by end of June 2024, an expert discovery to-be-complete deadline of end of December, essentially, 2024. And that Judge Castel also issued some orders which are talked about in your status reports; he had an ESI order, a confidentiality order, and an expert stipulation order, all three of which the parties talk about in their status reports, and it will be one of the action items that I have for you all that we're going to cover today.

And I'm also aware of an order in June of 2023 that was coordinating discovery between basically the MDL, you know, as relevant here, the plaintiff states, and the case pending in the Eastern District of Virginia, the DOJ case that addresses similar issues. So, generally speaking, these are some of the benchmarks for me of what's happened.

And so the agenda I have today for us, and you all tell me if you want to add to it, is to discuss where we're at in the case right now generally speaking and looking at scheduling going forward.

Number two, I have some immediate action items for the parties in the near term.

And related to two is three, which is that we are going to wind up -- I want to set a discovery conference in this case, and sooner rather than later, and I will follow up with you on what that is, because I can see from the status reports from the parties is that we have some discovery issues that it makes sense for this Court to figure out sooner rather than later. And indeed, I can hear from counsel on this, I do think that those discovery issues may bear somewhat on the scheduling order the Court's going to enter. So it's another reason why looking at those issues sooner rather than later is going to help this Court put in place a scheduling order that makes sense.

I will tell you now, at the outset, and then you can -- you all can discuss this, but I'm going to give you the action items that I have for you. So we know already from the Court's order issued leading up to this hearing that tomorrow you have a deadline of submitting a joint report designating either the record on remand or otherwise describing all filings in the MDL matter 3010 and the individual S.D.N.Y. matter, which was under 21-cv-6841, that should be made a part of this Court's docket in this cause number. That is something we need to, you know, put in place as soon as we can, so we know what all filings are now going

to be part of this record and that the parties and the Court can work off of.

Related to that is going to be action item two, which is both parties have referenced the orders I just talked about from Judge Castel -- the ESI order, the confidentiality order, the expert stipulation -- and what I noted was that the parties generally believe those orders should be adopted and continue in this court but they might -- you might be recommending some modifications to them.

So what I'm going to look for from the parties -- and you can tell me if this is too short a time frame -- is a joint proposal, if you can do a joint proposal by December 1st, as to whether those orders should be adopted or whether they should be modified and entered with some modification in this case. They're, obviously, very important orders concerning how discovery is going to go forward in this case.

And so I would like to get the parties' thoughts on that and try and get those in place sooner rather than later. You can tell me if December 1st is difficult. But it seems that these are items you've already been thinking about.

And then third action item, and we'll come back to this at the end, is going to be, as I just mentioned, a discovery conference in December. I will tell you all we have a trial starting on December 4, but what I will plan to

do is find a way to work this hearing in, even though we will be in trial. Right now, we're scheduled for trial for the week of December 4 and 11, same case. The trial may not go both weeks. And either way, I'm thinking if the parties' schedules permit, we can potentially -- I would like to see if we can't get that discovery conference in that time frame.

And what I anticipate is, as you would expect, both sides would have time to make submissions before that conference identifying your issues and positions. And, you know, you did a good job on these status reports of, you know, flagging these for me, *Here's things we see about discovery*. There are issues the States have raised with Google's discovery. There are issues Google has raised with the States' discovery. And I will want to talk about all those at the discovery conference.

And we will also discuss the suggestion that there may need to be, you know, a special master. You know, I will tell you I sort of convert that to more likely a magistrate judge being involved, but I'm willing to consider whatever the parties think ought to be considered in moving as efficiently as possible.

You know, the privilege logs, understandably, given the volume of documents, are very large and, as you've both noted, they're going to get larger. So if you're dealing with already a quarter of a million, you know, documents

identified, that's a lot.

And so that's my agenda for today. I want to start by allowing both sides, each side, to kind of talk about your view of where we are. I will tell you that what I'll do is follow up with you. You can roll into the schedule you've suggested. So when you talk about where we are, feel free to make your argument on the schedule that you've suggested to the Court.

And then I may have -- I'll tell you I have a couple of specific follow-up items that just have to do with certain things I'm not entirely clear on on how they were left in the S.D.N.Y., so I'll just ask you.

So Mr. Lanier, we can start with you, and if you'd like to give your synopsis of where we are and talk a bit about why the States' schedule is the one that makes sense.

MR. LANIER: That'd be great, Your Honor. Thank you very much. And thank you, obviously, for all of the thorough work you and your staff have put into this. It's very apparent and it's very appreciated, I'm sure, by all parties.

It's good to be back in God's country to have -- nothing pejorative meant about New York there, but it's good to be back in Texas and good to be back in the Eastern District. So thank you for that.

Your Honor, you have couched the issues that were

on our list to deal with today. At your allowance, I will put this into a little bit of perspective from our side of the V.

We did not file this case haphazardly. As you pointed out, there had already been pretrial work. Our venue was selected with care because we wanted to make sure we were able to move expeditiously, as well as with good precision and good judicial work. And so we filed here in December of 2020, as you pointed out, thinking that we were in a place where we could move on that track. You set us up to do that.

In 2020 is also when the *Epic* antitrust case was filed, the one that has just concluded settling on the courthouse steps as trial was beginning.

We thought we were postured well, and then we hit a bump in the road and that was the MDL bump. We beat, for example, the DOJ to filing by over two years. The DOJ filed in their rocket docket of choice out on the east coast, and it looks like they're requesting a trial setting. The judge has set a hearing in March of 2024, likely a trial setting that the DOJ wants in May. We internally have done the math and suspect it may move to later in the summer or early fall. I would be surprised if it goes in May. But that's a case that we beat in filing by over two years that we would love to beat to trial.

So many of the issues are the same, and yet the DOJ

couches its relief in a way different than we do. And we believe that we should be trying this case first. We believe it should be tried in your court. We believe that the delay of the MDL, we believe the additional subsequent months' delay with the mandamus that we would term to be, in the history of MDLs, quite a stretch and unusual mandamus effort, we believe that we should be in a posture to pick back up and move quickly. We believe what Judge Castel did in New York has been yeoman's work. And I do want the record to reflect a deep appreciation and respect for him for the way he was moving the case, and will probably still be moving that case which is still before him. But we are in a position where we need to go to trial sooner than later.

Just looking at the revenue that is continuing to accumulate, we believe at the expense of the citizens of the State of Texas and the other 16 states that I speak for -- 15 states and Puerto Rico -- you look just when we filed this, the advertising revenue for Google in 2020 was $146 billion, their advertising revenue in '22 jumps to 224 billion, and as of third quarter 2023, they're up another 9 percent above that. We view that as actual damage to our clients as we exist here on behalf of the State of Texas and these other states.

So we have sat down and made a list of what are the impediments to us moving to trial with rapidity. The first

impediment is, of course, the Court's schedule. And we cannot vouch for that. We're not privy to that. We do know that, by reputation and experience, you are one of the most thorough courts that we've been in front of in terms of being personally prepared for everything that comes down the pike. And we know that does not happen overnight. So we are sensitive to the Court's schedule. We just don't know what it is, so we're speaking out of our schedule.

We know that one of the impediments is getting the discovery done. Mr. Graham, who is seated opposite me at the head of counsel table on the jury side, is the head of litigation at Norton Rose Fulbright. In my crazy, rebellious youth, I worked at Fulbright and Jaworski for the first five and a half years out of law school, and still keep good ties there. And we have brought Fulbright in to help assist us in the discovery prep of this case.

Fulbright is also lead counsel in two other Google cases pending in Texas right now that are set for trial in August of 2024 and December of 2024. And they are -- have been and continue to be an immense help to us in doing what we need to do to get our discovery ready because they have been able to help us with the document issues, they've been able to help us with depositions, with experts, et cetera. So we have worked internally to fortify ourselves for the struggle of meeting any discovery deadline that we can

possibly have.

We do believe that a discovery master may be more helpful than simply a magistrate because we have seen evidence both in Virginia, in the MDL, and in the *Epic* case, that there have been concerns either expressed by the judges or experienced by the parties over what the Judge Donato has called, in essence, a -- I've got his exact language here -- he calls it an ingrained systemic culture of suppression of relevant evidence. There are issues about the deleting of chat dialogues that were used for substantive discussions within the company. There are issues with the company having put lawyers on emails and missives that didn't need the lawyers on them where it was, as one employee for Google put it, a fake privilege. There are issues that need to be addressed.

And I'm not making those accusations. I'm referencing what other folks have made because it's my responsibility as a lawyer to see to the fact that my client's not disadvantaged by any such behavior if it turns out to be as has been represented through the accounts that we've gotten.

All to say, when we've got a privilege log of 250,000 documents, and that's just on the first million-plus presented -- we don't have a privilege log on the 16 million documents that were presented three months after Google said

they had substantially complied with the document production -- we've had those 16 million since I believe August, and maybe it's September, but we still don't have a privilege log on those -- we think that it will be imperative to have someone with a great deal of time on their hands and experience to assist in the Court administering and examining those privileges, whether you deem it to be a magistrate or a master, or a combination of the two, whatever. But we know that discovery is an impediment. We know that those aspects of discovery are important.

As I listed my impediments, one of the things that I had on my list was a request for this Court to give us an early discovery hearing; it was on your list as well. We were hopeful internally that that might happen perhaps on December 8th, but we will make any date work that works with this Court because we believe that that is one that gives the parties time to put together a very clear submission to the Court that says, Here are discovery matters we agree on, here are those we disagree on, plaintiff view, defendant view, so that you've got a clear roadmap that allows you to navigate as cleanly as possible and as efficiently as possible.

We do pledge to the Court that we will continue to diligently try to integrate with the MDL court and Judge Castel, and the DOJ court. So, for example, so many of the experts that we'll be using in this case, as Google, are

probably similar experts, if not the same experts with very similar perspectives. We would like to be in a position to continue to get, and to begin getting, the expert reports as they're being produced in the Eastern District of Virginia.

We would like to have an ability to continue that judicial order of making sure we share discovery, so if the DOJ gets a set of documents, we should get the same documents in our litigation. And that should be done expeditiously, we believe.

THE COURT: Mr. Lanier, can I stop you for a quick question --

MR. LANIER: Anything.

THE COURT: -- along those lines. Because you talked about a continuation of the order regarding the Eastern District of Virginia, and I'm assuming, of course, you're referring to the discovery coordination order.

MR. LANIER: Yes, sir.

THE COURT: And maybe you can talk a little bit more about that. My understanding of that was there was a designated time frame during which that coordinated discovery was going to occur, and I'm probably not exact on this, but I think it was between July and September 2023, something like that. And so I know we've been looking at the E.D.V.A. docket, so I know that there's been some additional discovery ongoing with E.D.V.A. But maybe you can talk a little bit

more about that order, and maybe put a little bit finer point on how, from the States' perspective, you would like to see that continue, because it's a very precise order. And let me just also agree with your comments at the beginning of what an outstanding job that Judge Castel has done in moving the case forward.

So, yeah, tell me a little bit more about that coordination order.

MR. LANIER: Your Honor, you've actually fleshed it out. That's exactly what the order says, and those were the dates. We believe that that should continue. We should file some type of either an agreement among the parties that we can put into a letter to you, or an order to issue forth from this Court. But there is no reason for there not to be coordination to the extent that it's providing opportunities for joint depositions if there are such. But at this point in time, recognizing that fact discovery is closed in the federal case, what we're looking at more realistically are some of the expert issues and expert reports and things of that nature.

We're just looking to increase the efficiency, and it seems to me we ought to be able to agree to those types of things with Google. In the event we're not, or even if we do, perhaps either an agreed order or an order from this Court along the lines of what Judge Castel did, but extending

the time period, would be appropriate, it seems to us.

I'm near the end of what I wanted to say. I do know that the Court has referenced many of the rulings that Judge Castel did, that he pruned the claims, to use your terminology, which is good terminology, that we have since amended for DTPA. There's a host of discovery issues that come with that.

I read, as the Court did, the five-page missive prepared by Google. And while I don't agree with all of its characterizations, I think that's something that can be ironed out as well before your discovery hearing. Recognizing that the document requests that have been made are going to be the same document search terms that have already been allegedly used by Google, it's just going to perhaps apply to a new set of custodians, but that's pretty quick prep work in terms of getting the documents.

Now, I do know that Google has hired over a thousand contract workers to go through these documents. And so I would think, with expedition, they should be able to do that. That's not quite as many people as Fulbright and Jaworski or that Norton Rose has, but it's close. That's a facetious joke.

But, Your Honor, where we are on this is we just want to be -- we would like to be at the head of the train where we were initially when we started doing this work

because we think that it's important work that we would like to be lead in, and we think this Court should be lead in it as well.

So with that, I thank you, Your Honor, and that's my view of the world.

THE COURT: I have one more -- just one more question for you before I hear from Mr. Mahr, and Mr. Mahr may address this as well. But as the case is transitioning to this Court, one of the things that I'm looking at are just what stay orders or any other kind of abate orders may have been in place in the S.D.N.Y. regarding sort of the order in which the case was proceeding. So some of that is referenced in the status reports in terms of from Google's perspective when they could start taking depositions and things like that. But so I don't know if you can address what orders were in effect along those lines at the time the case was remanded.

MR. LANIER: Your Honor, at this point, we believe that the discovery should be wide open. There was a delay in the DTPA and discovery work to be done there, but we have since filed now our request for production of documents. Google is seeking documentation on that as well. And we're in full-blown discovery mode as far as we're concerned.

This is a case where you've got these resources I referenced. I think it's notable and it's nice to see

Mr. Yetter again. He's not been active that we've seen in the Southern District of New York, but I know he's been active representing Google in other cases; and then, of course, Mr. Mahr with Freshfields. And Google's got a host of lawyers to draw on. We've seen Paul, Weiss; Wilson Sonsini; Axinn; Morgan Lewis; Munger Tolles; Hogan Lovells, and others representing them through these various matters. So we think the manpower is there to do the discovery on both -- on all issues, and we think that it's open at this point on all issues.

THE COURT: And Mr. Lanier, were there any other motions, any kind of substantive motions or otherwise, that were pending in the S.D.N.Y. at the time of remand? I didn't see any, but I want to make sure --

MR. LANIER: No, there are not, Your Honor. There was no motion to dismiss against the DTPA-type claims, for example. We have no doubt that there would be motions for summary judgment and expect the same would be filed, and so those need to be incorporated into your schedule. There were no Daubert motions or anything like that filed yet. And so I think -- I think not.

THE COURT: All right. Thank you, Mr. Lanier.

MR. LANIER: Thank you, Judge.

THE COURT: All right. So Mr. Mahr.

All right. Let's hear from Google on where you

think we are, what's happened, and maybe you can talk a little bit about the schedule Google's proposed to go forward.

MR. MAHR: Yes, Your Honor. Good morning and thanks for the welcome back. I feel as welcome here as in New York. Being a Virginian, neither of those are my home, but both great places to practice law.

To your first point where we are, and I think you alluded to this, I would just add a couple of things. As you pointed out, Judge Castel very consciously made the States' antitrust claims the bellwether claims and the bellwether complaint in that case. He also very consciously stayed the state law -- potentially the state law claims, and that means there has been a stay of our ability to move to dismiss the May 5th complaint, the fifth complaint, which has ballooned in size since you last saw it, with respect to the DTPA claims, and we would like the opportunity to do that.

There's also been a stay of our ability to depose the plaintiffs. And now that dissolved I believe at the end of discovery in the E.D.V.A. for a large part of discovery, that's been -- I believe has been stayed.

THE COURT: I wasn't sure whether the E.D.V.A. discovery deadline had moved or whether there were just certain discrete discovery -- pieces of discovery that were allowed to go on after the deadline happened.

MR. MAHR: Magistrate Judge Anderson was adamant that it was not moving. The discovery ended except for -- and we can get into the details of this internal discovery error that resulted in Google having to produce a massive amount of documents after the close of discovery, but it was only for that that discovery was open, and Google depositions that might have relied on those documents, which are going on now.

THE COURT: I know this is more for the discovery conference, but I've read quite a bit about that, you know, about what you just referenced, this, you know, this large number of documents that you needed to go through that hadn't been gone through. But a question I have right at the moment is, is that process still ongoing as to those documents or has that process been completed as to those documents, meaning Google's review of those?

MR. MAHR: That process has been completed, and that privilege log applies to those documents as well. So it is a large privilege log. But when you ask for a massive amount of documents, you're going to get a large privilege log.

As far as your action items, the record on remand, we sent that last week in the form of a joint proposal with plaintiffs. They're looking at it. We ought to be able to do that, as ordered, tomorrow.

ESI, confidentiality order, and expert stipulation, we passed those to plaintiffs just over the weekend, so they haven't had a chance to look at them, but I think your December 1 proposal makes sense. And based on our review of them, I think there are cosmetic changes to make them applicable in this court, but that's it.

As far as a discovery magistrate judge, we're open to that, obviously, if the Court wishes.

I would say Mr. Lanier was referring to a lot of discovery battles in a lot of other cases, but we've had one privilege motion in this case so far before the E.D.V.A., and Judge Anderson upheld our privilege claims in that.

Regardless of what is found in other cases to have been a culture within the company, I am responsible and my firm is responsible for reviewing all privilege to make sure however it's labeled by the time it gets into this case, it -- privilege documents -- properly withheld privilege documents are withheld, and those that are marked privilege but not properly privilege are produced. And we have done that. A mammoth task, but I assure you we have done that and we will continue to do that.

So to turn to our proposal. Google's proposal is built on two, really, key principles. The first is we think it's important to preserve the benefits of the coordination that has already taken place and that is already taking place

in the MDL by continuing to follow the orders and the schedule that Judge Castel very carefully put together for fact discovery. He worked hard to fashion a fact discovery plan that served both -- first served all the parties in the case, and there were multiple parties in that case.

But the second principle is to allow the parties now to take advantage of the speed and efficiency of this Court. And we think we do that by returning to your schedule, the schedule Your Honor thought through and carefully devised when we were last here, and having that schedule govern from the close of fact discovery forward.

We believe this approach balances the speed and efficiency with coordination and fairness by relying on the work of the two district judges who have overseen the case and carefully considered these issues. In other words, there is nothing new to decide here. We're in fact discovery, we're halfway through it, and it's progressing. And under Judge Castel's schedule and orders, we don't think that cutting that off and risking the benefits of that coordination make sense.

However, when that fact discovery period is over, we think we should return to your schedule. There would be an argument you could do the same with experts. But we think since expert discovery hasn't started, that we are ready to move on your schedule at the end of the fact discovery here.

These two principles, preserving the benefits of coordination and while at the same time taking advantage of the speed and efficiency that this Court offers, we think are kind of emblematic of a very reasonable, simple, straightforward, bottoms-up approach where we're seeing what actually needs to be done in the case.

What I hear from Mr. Lanier is that they want to win a race with DOJ. And we don't think that kind of top-down I want to go first is the prudent way to go about determining how to address the issues in this case. There are a massive number of DTPA claims from 17 states that have become a big focus of the States' case, and that makes it a lot different from the one pending in the E.D.V.A.

Judge Castel's orders. One reason to preserve or the reason to preserve the coordination that's taken place so far is that I think both sides agree that Judge Castel's orders regarding coordination have served the parties well. And to date, the state plaintiffs have especially benefitted, they've benefitted to the tune of 6 million documents from 150 custodians; 80 terabytes of data; 20 gigabytes of source codes; all in response to 301 requests for production that the state plaintiffs put together with the MDL plaintiffs.

I remember, in our previous hearing, Mr. Lanier considering whether 50 RFPs would be enough and he said he couldn't commit to that but would try to get close; there are

301. And Texas has just served another 101, as he mentioned. And that's just Texas. Remarkably, there's still not coordination on the States' side. And sometimes we get something that's just from Texas. Sometimes we get something from all 17. Sometimes it's from 15 of the 17. But we have that massive amount of discovery to do.

Plaintiffs also have benefitted from the coordination through being able to pool their resources with the private and class plaintiffs. Judge Castel set up a discovery steering committee of five lawyers, two of whom were from the state plaintiffs. They participated in weekly meet-and-confers, including just last Friday; they are continuing. They have lawyers for the States participating in these meet-and-confers.

They have also benefitted from the coordinated schedule through the stay, as I mentioned before. They haven't had to respond to a motion to dismiss on the state law claims, and that continues to be stayed, and they haven't had to face party depositions yet.

As a result, remarkably, at least with respect to the state law claims, we are still very much learning their case. In contrast to the six million documents that we produced, we've got less than 15,000 from the 17 states, and 3 of them haven't produced a single document. And I don't -- I, obviously, don't expect the States to have as many

documents as Google or anything close to it, but I think the fact that some haven't even responded yet with documents is remarkable.

I think more troubling is that after three years, the States continue to be unable to respond to some fundamental questions in interrogatories about their claim: Who? What? How much? We've asked them whom do you represent as a parens patriae? Is it consumers? Advertisers? Publishers? Competitors? Users?

We get the answer *All of the above*. Can't tell us anything more than that. We hear things -- in May, Texas says that some agencies use Google ad techs, but they haven't yet told us which ones. We get messages like some plaintiffs will be dropping their damages claims, but we haven't been told which ones. And the identity of who they represent is very important here because there are legal consequences to the shoes in which they stand as parens patriae; for example, indirect purchaser bars and issues like that. Haven't gotten any answer.

So we have this list of these claims, antitrust and state claims, from 17 states, and this list of plaintiffs, but never have they provided us with, well, on the antitrust claims, we're representing these folks; and on the Texas DTPA claims, these folks. Because there are limitations, as you know, under each DTPA as to what kind plaintiff is eligible.

When it comes to the what, what relief -- damages, disgorgement, restitution, equitable relief, fines, penalties -- the response is *We seek all appropriate relief.* After three years, can't tell us under what statutes they're seeking which relief, much less how much. Federal Rule of Civil Procedure 26(a)(1)(A)(iii) requires them to provide a computation of each category of damages claimed. We've got nothing.

So a lot of benefits to the plaintiffs in this discovery claim, but still lots to do. And, you know, this is less a complaint than pointing these out, because this is how Judge Castel organized it. Get the document discovery first, get that all out; put the state law claims on the back burner for now, focus on the antitrust claims. But now that we're back before this court, the state law claims come front and center.

So we've got the motion to dismiss to the state law claims. We've got a motion to compel the States to respond that we've been kind of holding onto until we're before Your Honor rather than presenting it to Judge Castel. We've got the depositions versus the states and parties whom they seek to represent on parens patriae. And then we've got responding to the 101 new RFPs. So there's lots to do.

I think the last thing I would say is, unfortunately, we don't think that this is one of those

situations where the Court can kind of take the middle ground between two different proposals. Our proposal again is based on the order of Judge Castel and the structure he set up for fact discovery, and we think interrupting that in the middle squanders the benefits of the coordination. And, frankly, it hurts Google because we haven't had the opportunity to do discovery on the state law claims we need.

And then, obviously, we pick up with your schedule after fact discovery closes. And we think that you put a lot of effort into it, it was a compromise between the two sides' wishes then, and we think it's still appropriate now.

THE COURT: All right. Thank you, Mr. Mahr. Let me see if I have a question for you before you sit down.

No, I don't think I do. Thank you.

MR. MAHR: I had the benefit of hearing Mr. -- your questions to Mr. Lanier and I tried to cover them.

THE COURT: Right. I think you did.

So Mr. Lanier, any followup you'd like to provide?

MR. LANIER: Yes, please.

Just briefly, Your Honor. Thank you. First of all, three things to cover -- four things to cover. ESI discovery, 12/1, we agree. We can get through that. We can take care of that. We got it back from them. They're not huge changes. Easy to take care of.

Number two, he said his proposal is built on two

things, to preserve the MDL coordination with Judge Castel's plans, and to take advantage of the speed in this court afterwards. Your Honor, with due respect, there's no need to preserve the MDL coordination with Judge Castel's MDL schedule. His schedule was built not only on the parties, but also built upon his Southern District of New York schedule as well, when he had time for hearings, when he had time to proceed on matters.

The idea of us coordinating with them is useful in the sense if we're taking a deposition in one place, that deposition can also be taken jointly, there's great coordination there. But tying us to his schedule is not something that should be done. And I dare say if he had known about what was going to happen in the Eastern District of Virginia when he had produced his schedule already, he might have modified his schedule from the very beginning. I don't know that. But tying us to his MDL schedule that he set out years ago is not something that's productive, in my mind.

Third, Google complains that they don't know the who, what, and how much. Parens patriae. Yes, they knew the who. We claim to represent all of them. All of the above. That's -- he said it.

What. There are only five states that seek restitution. There are only two states that seek damages if

you count Puerto Rico as a state, which I guess I shouldn't. So there's only one state and the District of Puerto Rico that seek damages.

As to the amounts of those damages, that's information that Google has, by and large, that we're trying to get from them. They know the numbers. They know how much they've sold. They know the number of ad auctions there have been. They know that type of data. That comes, by and large, from them.

And then the last point that I would make is the argument that Mr. Mahr advanced that we -- that the Court can't take a middle ground between our schedules because it will basically tax Google and make Google be inefficient with doing something in the MDL that might have to be duplicated off of something they've done here. That's not the first time that argument's been waged. That argument was even waged in the legislative fights over the law that was passed to get us back here.

And in those legislative fights, the legislators themselves wrote a very clear letter that said, The -- here, for example -- State of Texas is right to have their citizens and their courts hear their disputed matters that concern the State of Texas, outweighs any potential inefficiencies to Google. Basically, Google's big enough to handle it. The legislator themselves took that into account in drafting and

passing this legislation that's got us back here.

So thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Lanier.

Mr. Mahr, is there anything else you wanted to say? I'm going to give you an opportunity.

MR. MAHR: Very quickly, Your Honor.

The coordination benefits not only Google, but also the third parties that have to be deposed, that potentially have to be deposed twice, including former employees, former employees of competitors, customers. There's a whole lot that happens when you pull apart the coordination halfway through this fact discovery schedule.

THE COURT: All right. Thank you, Mr. Mahr.

So as I mentioned at the outset, I do think that the Court's decisions on scheduling are going to be affected, obviously, by what we're looking at when we do the discovery conference and looking at the discovery issues. I will say that in deciding what kind of schedule we're going to have going forward, you know, Mr. Lanier had mentioned, well, really three items: The Court's schedule, completing discovery, and then the third is in that context, you know, what comes from the discovery hearing.

And Mr. Mahr has mentioned dual themes, from Google's standpoint, of taking advantage of the coordination that was provided in the proceedings in the Southern District

of New York, and then also the efficiencies saying early of this Court and its docket.

So what I'll say on the Court's schedule is this case was originally filed, as you know, in late 2020. My view of the Court's schedule is that we're going to move this case as efficiently as we can, and we will make this Court's schedule work to accommodate the needs of this case. Given its posture, given its history, the Court is going to accommodate its schedule to the efficient resolution of this case. But I want to be clear that when I say "efficient resolution," that means that we need to know and we need to make sure that we have a sensible schedule for discovery, that we have a sensible schedule for experts and dispositive motion practice and everything else.

I don't want to sacrifice handling the case in a thorough and proper manner for, let's say, an over emphasis on speed. We want it to be done efficiently. We want it to be done fairly. The Court's going to accommodate its schedule to what makes sense and what's fair and efficient to both sides in this case.

But I will tell you that as I look at it, these discovery issues and the schedule going forward of dealing with those issues, and the parties being able to engage in the motion practice they need to engage in, and the Court having the time to decide those motions, that's what's going

to drive the Court's schedule, and we will otherwise make the schedule work to accommodate this case.

So I want to just recap the next things you're going to see from this Court that we've discussed today. So I do plan to issue an order that asks the parties to put forward their joint proposal regarding the ESI order, confidentiality order, and expert stipulation by December 1.

I will also set a discovery conference in the -- within the first two weeks of December. And, Mr. Mahr, you know, let me -- you can respond from the table. Mr. Lanier had identified December 8 as a date that was available for the plaintiff states. So I don't know, Mr. Yetter or Mr. Mahr, is December 8 a date that works for Google?

MR. YETTER: Your Honor, I was going to mention this to you. I have a trial that week as well, December the 4th. It's only a one-week trial. So the next week, second week of your trial, would be much preferred for us. Starting the 11th of December would be much better. And I haven't asked Mr. Mahr, but that's -- I just wanted to flag that for my schedule.

THE COURT: Well, what we'll do is I'll have my judicial assistant follow up with the parties likely today. We'll identify the best date and we'll get it -- we'll get that discovery conference set.

And I take it that tomorrow still works for the

parties with regard to designation of the record? I see a thumbs up from Mr. Lanier.

Mr. Mahr --

MR. MAHR: Yes, Your Honor.

THE COURT: -- already said the same.

So those are the next -- those are what's coming up in this case. I do want to thank counsel for the submissions you've already made, which were very helpful, including the attachments. And if there's any other information that the Court's going to need as we're transitioning the case, I don't want you to hesitate to file additional submissions.

I will let you know that I anticipate having both parties submit briefing prior to the discovery conference. So if we anticipate it occurring the week of December 11th, let me ask you if, first of all, the parties have any objection to having a joint deadline for those, meaning the same day both of your submissions would be due from both sides.

Any problem with that, Mr. Lanier?

MR. LANIER: No, Your Honor.

THE COURT: Any problem with that, Mr. Mahr?

MR. MAHR: None, Your Honor.

THE COURT: And in terms of page length, I would like to put a reasonable limitation on that, but is something like ten pages enough, or do you think you might need more

than that?

MR. LANIER: Your Honor, ten pages works well, especially if we've got an ability to do an appendix, if need be, or something like that.

THE COURT: Right. It will be ten pages exclusive of attachments.

Mr. Mahr, does that work for Google?

MR. MAHR: It does, Your Honor.

THE COURT: And in terms of timing, I anticipate it would be helpful to have that about a week before whatever the hearing date is. So again that's probably going to be, right, early December, sometime that week of December 4. I see a thumbs up from Mr. Lanier.

And, Mr. Mahr, is that going to work for Google?

MR. MAHR: It will.

THE COURT: All right. Counsel, I think we've gotten through everything I thought we need to talk about today. But I want to give you the opportunity. If there's anything else you think we need to talk about, let me know.

Mr. Lanier?

MR. LANIER: Nothing from plaintiff, Your Honor. Thank you.

THE COURT: Mr. Mahr, anything from Google?

MR. MAHR: Nothing here.

THE COURT: All right.

MR. MAHR: Thank you, Your Honor.

THE COURT: All right. Thank you again, counsel. We'll stand in recess.

(Adjourned at 10:30 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Gayle Wear, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of Texas, do hereby certify that pursuant to Section 753, Title 28 United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated 26th day of November 2023.

/s/ Gayle Wear
GAYLE WEAR, RPR, CRR
FEDERAL OFFICIAL COURT REPORTER